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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 26 2010

EAC 07 255 52182

IN RE: Petitioner: [redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, part of a Christian liberal arts college, seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a professor of economics. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits evidence intended to support the waiver claim, while also claiming that it had not intended to seek the waiver.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

We note that, to apply for the waiver, the USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires the petitioner to submit Form ETA-750B (or the corresponding sections of the more recent ETA Form 9089) in duplicate. The petitioner has not submitted this required document. Therefore, the petitioner has not properly applied for the waiver.

The petitioner filed the petition on July 7, 2007. [redacted], the petitioner's coordinator of faculty services, signed the Form I-140 petition. In an accompanying letter dated September 17, 2006, [redacted] stated:

> It is with pleasure that I write this letter in support of [the beneficiary] to obtain a National Interest Waiver. . . . He is enthusiastic and tireless in teaching our students in the School of Professional and Adult Studies (SPAS). He shares his extensive knowledge in a professional, interesting manner, and his enthusiasm for his subject is evident in the classroom.
>
> . . . I have found his work to be thorough, well written and he is a consummate professional both in and out of the classroom. [The beneficiary] is scheduled to teach numerous classes for us throughout next year. We do not want to loose [*sic*] him as our adult programs are ongoing and we need him to teach specialized courses in SPAS.
>
> His students praise his teaching style. . . . He has had consistently high ratings from students about his teaching, presentations, knowledge and a wide variety of world experience. . . .
>
> We support [the beneficiary's] efforts to pursue his wish to become an American citizen through the National Interest Waiver.

[redacted] of East Carolina University, Greenville, North Carolina, stated:

> I have known [the beneficiary] over the last four years. . . . [W]e are currently on the same committee that is charged with promoting the empowerment of women in Africa in the new global economy.
>
> . . . [H]is training in economics, finance, business management and sociology uniquely qualifies him for the multi-disciplinary nature of work on economic growth and development, in the era of globalization. . . . Through his teaching and research, he will make valuable contributions to the colleges and universities that employ him, to his community, and to the nation.

[redacted] of Belmont Abbey College, Belmont, North Carolina, stated:

> I've known [the beneficiary] for one year, talked with him concerning the academics job market, and have assisted his efforts to find full-time work. From my conversations with him and reviewing his curriculum vitae, I am impressed with what he can bring to an academic institution and to the U.S.
>
> His education is broader than what most economists earn. He complements his economics training with studies in business management and sociology. . . . He also has

> experience with business consulting and working with non-profit organizations. His diverse background makes him suitable for a liberal arts college and for participating in interdisciplinary/professional programs in American universities.
>
> I've examined his student teaching evaluations and his scores in all categories indicate quality teaching.

The above letters contain general praise for the beneficiary. The quoted witnesses clearly consider the beneficiary to be well qualified for a university teaching position. The national interest waiver, however, is a special benefit over and above the basic classification sought, and the threshold for that benefit is well above simply being competent and qualified to do one's job.

The petitioner submitted a list of five "publications in progress," indicating that the beneficiary had presented one paper at Wake Forest University, with one more "ready to be presented for publication" and the other three "in progress." The beneficiary's *curriculum vitae* did not list any published work. Thus, the petitioner did not claim that any published work by the petitioner was in print as of the petition's filing date.

The petitioner's initial submission also included course evaluation materials and general documentation of the beneficiary's professional credentials and his participation at various conferences. As with the letters, these documents show that the beneficiary is qualified and active in his profession, but they do not set him apart from other qualified professionals in his field.

On February 26, 2009, the director notified the petitioner that the director would deny the petition unless the petitioner submitted evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation.* In response, the petitioner submitted additional documentation of the beneficiary's credentials and a list of courses that he has taught. The petitioner made no effort to establish the beneficiary's eligibility for the waiver. In a new letter, [redacted] stated: "we find that we checked the wrong box in our original petition," and that the beneficiary "is NOT seeking a National Interest Waiver" (emphasis in original). Considering [redacted]'s repeated use of the phrase "National Interest Waiver" in her September 2006 letter, her subsequent claim lacks credibility. Nevertheless, we acknowledge the petitioner's evident abandonment of the waiver application. This issue resurfaces on appeal, and we will discuss it in greater detail in that context.

The director denied the petition on May 6, 2009, stating the petitioner "failed to submit any of the information we requested." The director found "there is no evidence whatsoever that suggests the beneficiary warrants a waiver of the labor certification requirement in the national interest."

On appeal, the petitioner repeats the claim that "we had checked the wrong box in our original petition" and that the beneficiary "is not seeking a National Interest Waiver." The petitioner indicates that the petitioner had intended to seek to classify the beneficiary as a member of the professions holding an advanced degree, but not with a national interest waiver. In a supplement to the appeal, the petitioner submits documentation showing that it has applied for a labor certification on the beneficiary's behalf.

As previously discussed, the petitioner checked box "i" at Part 2 of the Form I-140 petition, indicating that the petitioner sought a national interest waiver requesting to classify the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct." The individual who signed Form I-140, [redacted] repeatedly referred to the waiver in her letter accompanying the initial filing. There is no credible evidence that the petitioner simply "checked the wrong box." Rather, the record indicates that the petitioner deliberately sought the waiver, but then changed its mind upon learning the caliber of evidence required to show the beneficiary's eligibility for the waiver.

The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, 286 Fed. Appx. 963 (9th Cir. July 10, 2008). While the petitioner, here, does not seek an entirely different classification for the beneficiary, the petitioner nevertheless seeks a fundamental readjudication of the petition on a comparable scope.

Moreover, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition with a request for the national interest waiver. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[1] If the petitioner seeks adjudication of the petition with a labor certification, then the petitioner must file a separate Form I-140 petition, with the accompanying fee and an approved labor certification, requesting that adjudication.

Furthermore, even if we were to entertain a change of adjudication at this late date, we would have to find, also, that the petition was not properly filed. When a petition involves a labor certification, the approved labor certification must accompany the initial filing of that petition. *See* 8 C.F.R. § 204.5(a)(2). The filing date of the application for labor certification determines the petition's priority date. *See* 8 C.F.R. § 204.5(d). If a petition that requires an accompanying labor certification is filed without that labor certification, the petition cannot be approved, and a denial on that ground cannot be appealed. *See* 8 C.F.R. § 103.1(f)(3)(iii)(B)(as in effect on February 28, 2003).

While the petitioner, on appeal, contends that it had applied for the waiver essentially by mistake, the petitioner also attempts to address the guidelines in *Matter of New York State Dept. of Transportation.* The petitioner submits documentation of the beneficiary's participation in professional conferences and other evidence of his continuing work in his field. The petitioner, however, had already forfeited its opportunity to submit evidence in support of the waiver claim.

[1] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html.

The director had specifically informed the petitioner of the deficiencies in the record in the February 26, 2009 notice discussed earlier. At that time, the petitioner could have submitted materials to support the waiver claim. Instead, however, the petitioner chose to effectively abandon the waiver claim by asserting that the beneficiary "is NOT seeking a National Interest Waiver." The credibility of the petitioner's claim to have "checked the wrong box" is irrelevant here. What is important is that the director informed the petitioner that the petition would be denied without evidence of the beneficiary's eligibility for the waiver, and that the petitioner declined to submit such evidence at that time.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. The petitioner made no effort to establish the beneficiary's eligibility for the waiver at the appropriate point in the proceeding, and we will not consider the petitioner's later untimely attempts to do so. The petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee. The petitioner asserts that it has already applied for such a labor certification, which, if approved, can properly form the basis for a new petition.

ORDER: The appeal is dismissed.